Supreme Court, U.S.
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No. 01-87

In the Supreme Court of the United States

STATE OF NEBRASKA, PETITIONER,

v.

CENTRAL INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMMISSION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondent openly acknowledges that "this case is indeed important, with undeniable implications as to the future of the interstate compact as a constitutional device for regional approaches to solving the nation's problems." (Opp. at 12). It further recognizes that the Eighth Circuit's finding of an Eleventh Amendment waiver here depends upon the use of a more relaxed standard for discerning a State's consent to federal suit than is applied in non-compact contexts. (Opp. at 19). Respondent justifies this relaxed approach by referencing three prior decisions of this Court – *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990); and *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994) – from which it somehow extrapolates the unstated proposition that "this Court considers a broader range of factors when deciding Eleventh Amendment immunity issues in the context of such a 'trigovernmental [compact] arrangement,' as opposed to a state's unilateral or 'general' waiver of its immunity." (Opp. at 19).

Despite these acknowledgements as to the case's importance, and the Eighth Circuit's less than "stringent" waiver analysis, *cf. Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), Respondent argues against a grant of certiorari on grounds that the sovereign immunity issue Petitioner has asked this Court to hear is not presented here, and, even if presented, is of an interlocutory nature not ripe for review. Neither contention has merit.

The Eighth Circuit has clearly ruled that a waiver of immunity from federal suit on claims seeking damages and other retrospective relief can be *inferred* from a State's consent in an interstate compact to actions pursuing exclusively prospective relief "in any court . . . that has jurisdiction."

Compact Art. IV(e).[1] As noted in the Petition, and ably reinforced by the supporting *amici* brief, that decision conflicts with this Court's precedent, is at odds with other federal circuits, and does serious violence to the core protections afforded States in our constitutional framework. If allowed to stand, the intrusions upon state sovereignty in the opinion below will be far-reaching and will assuredly be felt by every State in the Union. Accordingly, the issue presented deserves plenary review by the Supreme Court.

I. THE EIGHTH CIRCUIT'S RELAXED WAIVER STANDARD IN THE CONTEXT OF AN INTERSTATE COMPACT RAISES AN IMPORTANT ISSUE REQUIRING THIS COURT'S REVIEW

While Respondent endeavors to avoid the issue raised in the Eighth Circuit's decision by broadly characterizing the Compact in general terms so as to suggest an assignment of unlimited enforcement authority to the Commission, it does not dispute the operative provisions of the Compact. The issue before this Court undeniably centers on Article IV(m)(8) – authorizing the Commission "to require all party states *to perform* their duties and obligations arising under this compact," (emphasis added) – and Article V(e)(2) – authorizing the Commission to direct the Host State "*to process* all applications for permits and licenses . . . *within a reasonable period from the time that a completed application is submitted.*" (emphasis added).

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[1] Indeed, it was the Eighth Circuit's view that its preliminary injunction ruling – finding language in the Compact of a consent to suit for *Ex parte Young* relief, *but not* for "[r]elief in the form of money damages," App. 68a – was sufficient to infer a waiver by the State as to all federal claims under the law of the case doctrine. App. 13a.

It is certainly true, as Respondent points out (Opp. at 13), that Article IV(m)(9) empowers the Commission to "take such action as may be necessary to perform its duties and functions," and that, to that end, the Compact further authorizes the Commission in Article IV(e) to "initiate any proceedings . . . before *any court of law . . . that has jurisdiction* over any matter arising under or relating to the terms or the provisions of this compact." (emphasis added). But these particular articles are, of course, merely enabling provisions, and do not in any respect alter the Commission's responsibilities under Articles IV(m)(8) and V(e)(2) to ensure – through appropriate court action if necessary – the party States' performance of their duties and obligations and the Host State's timely processing of license applications.

Petitioner has discussed more fully in its Petition why the Compact provisions cited above embrace only a consent by party States to the Commission's pursuit of prospective relief, and even then, only in a court having jurisdiction. Pet. at 14-22. Nowhere does the Compact identify *federal courts* as among the Commission's venue options. Indeed, the language agreed upon by the party States is careful to use "Federal" in Article IV(e) only as a modifier of "agency, board, or commission," *and not* as a modifier of "court."

Moreover, as to pursuing the States retrospectively, the Compact again speaks to that directly and explicitly, not in Articles IV(m)(8) or (V)(e)(2), but in Articles V(g) and VII(e). These latter provisions give the Commission authority to seek the remedies of revocation and suspension *administratively*, after notice and hearing, (i) against the Host State for having "arbitrarily or capriciously denied or delayed the issuance of a license," Art. V(g), and/or (ii) against any party State that "fails to comply with the terms of th[e] compact or fulfill its obligations [t]hereunder." Art. VII(e).[2] Nowhere in

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[2] Respondent conveniently ignores these provisions in its assertion that Petitioner proposes a construction of the Compact limited solely to a

(*footnote continued on next page*)

the Compact, however, is there authorization for the Commission to pursue such retrospective claims against the party States *judicially*. *See* Pet. at 18.

Without such an explicit waiver, either "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable" interpretation, *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quotation omitted), federal actions seeking money damages and other retrospective relief against the State of Nebraska are constitutionally barred. This Court has admonished repeatedly that immunity waiver language must be construed narrowly, "indulg[ing] every reasonable presumption against waiver." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). The phrase "in any court of competent jurisdiction" has been adjudged insufficient to subject a State to federal suit without a more explicit indication of an intent to include *federal* courts. *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 579-80 (1946). The same holds true for a State's consent to "suits, actions, or proceedings of any form or nature at law, in

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"cease and desist" remedy. (Opp. at 13). Petitioner has never contended that either Respondent or the other party States are without recourse against Nebraska to remedy alleged past misconduct. Clearly, the Compact's revocation and suspension options are available to the Commission, together with the monetary payments imposed by the Compact in Article VII(e). Further, the Compact empowers the Commission to intervene on behalf of aggrieved license applicants in the *de novo* state court appeal that is afforded such entities under Nebraska law following a final denial of their applications. *See* Art. IV(e); Neb. Rev. Stat. § 84-917(5). Finally, there is no constitutional impediment in the Eleventh Amendment to an original action in this Court by another party State against the State of Nebraska. *But cf. Southeast Interstate Low-Level Radioactive Waste Mgmt. Comm'n v. North Carolina*, 121 S. Ct. 2545 (2001) (refusing to allow interstate compact commission to invoke Supreme Court's original jurisdiction, presumably on authority of *Hess*, 513 U.S. at 41-42, that the commission is not a sovereign entity).

equity or otherwise," absent an explicit reference to federal courts. *Feeney*, 495 U.S. at 306-07.

Neither the Eighth Circuit nor Respondent points to any explicit waiver language in the Compact here. Rather, they rely on the aforementioned consent to prospective suits "in any court . . . that has jurisdiction" to find in the Compact consent by the member States to federal suit for *all forms* of relief, including money damages and other retrospective relief.

It is doubtful whether consent to a Commission suit for the purpose of requiring a party State "to perform" its Compact obligations, Art. IV(m)(8), or "to process" a license in a timely manner, Art. V(g), even implicates the Eleventh Amendment, as opposed to falling within the *Ex parte Young* **exception** to the Eleventh Amendment. *See Alden v. Maine*, 527 U.S. 706, 747 (1999) (*Ex parte Young* is an exception to, not a waiver of, Eleventh Amendment protections). In any event, to read into the limited consent (whether by application of law of the case doctrine or otherwise) a broad consent to *any* federal claim the Commission might assert against party States – including claims for damages and other retrospective relief – is contrary to the decisions of this Court,[3] other federal appellate courts,[4] and the Eleventh Amendment. It similarly ignores the Supreme Court's strong admonition against construing public contracts in a manner that would impose obligations on governmental entities by implication. *See United States v. Winstar Corp.*, 518 U.S. 839, 874 (1996) (continuing this Court's long adherence to a "canon of construction disfavoring implied governmental obligations in

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[3] *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974).

[4] *See Broughton Lumber Co. v. Columbia River George Comm'n*, 975 F.2d 616, 619-20 (9th Cir. 1992); *Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218, 221-22 n.3 (D.C. Cir. 1986); *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 39 (2d Cir. 1977).

public contracts").[5] Yet, that is precisely the decision of the Eighth Circuit, and it thus squarely raises the question presented in this petition.[6]

Moreover, contrary to Respondent's assertion, the Supreme Court's decisions in *Petty*, *Hess*, and *Feeney* – to the extent that those precedents retain viability[7] – do not support the Eighth Circuit's looser waiver standard; in fact, they contradict it. *Petty* predicated its waiver holding on a statutory provision stating explicitly that the commission consented to suit in "any court . . . of the United States." 359 U.S. at 277. So, too, the operative waiver language in the Port Authority compact involved in *Feeney* and *Hess* made explicit reference to any "judicial district, established . . . by

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[5] Respondent seems oblivious to the distinction between private and public contracts, and particularly the requirement of *specific consent* by the sovereign before suits can be maintained against it for damages. *Cf. United States v. Mitchell*, 463 U.S. 206, 212-19 (1983) (discussing federal government's waiver of sovereign immunity under the Tucker Act for claims seeking damages for certain contract breaches).

[6] Respondent seeks to minimize the importance of this case by referencing distinctions between the Compact at issue here and other low-level radioactive waste disposal compacts (Opp. at 21-22 n.1). While there are certainly differences in the enforcement powers conferred upon the various commissions in these other arrangements, what is most striking is that nearly all of the compacts use identical language authorizing the commissions "to appear as an intervenor or party in interest before any court of law . . . that has jurisdiction." The Eighth Circuit's reasoning would thus also expose member States in these other compacts to inferential federal actions seeking retrospective relief. Moreover, as discussed in the *amici* brief, there are a large number of other compact arrangements utilizing language indistinguishable from that contained here.

[7] Both *Petty* and *Feeney* are of dubious precedential value to the extent they hold that compact commissions must be endowed with the same sovereignty as a member State. *See Hess*, 513 U.S. at 41-42.

the United States." *Feeney*, 495 U.S. at 307.[8] There is nothing in any of those decisions suggesting that a waiver of sovereign immunity can be grounded on language any less explicit and, in fact, the discussion in *Feeney* indicates just the opposite. *Id.* at 306.

Respondent's reference to *Texas v. New Mexico*, 482 U.S. 124 (1987), as somehow helpful to the argument against a grant of certiorari is equally baffling. That case involved a dispute between two sovereign States, and thus was filed as an original action in the Supreme Court. The Eleventh Amendment was in no way implicated. *Id.* at 130.

In sum, the Eighth Circuit's less demanding approach to waivers of constitutional immunity in the context of interstate compacts is not only without support in law, but reflects a manifest indifference to the most basic principles of federalism. This Court's intervention is thus required.

II. IMMEDIATE SUPREME COURT REVIEW OF A FINDING OF SOVEREIGN IMMUNITY WAIVER IS APPROPRIATE AND NECESSARY

Finally, Respondent argues that, notwithstanding the Eighth Circuit's definitive rejection of Petitioner's Eleventh Amendment sovereign immunity defense on all claims seeking retrospective relief, this case is not ripe for Supreme Court consideration. (Opp. at 9-12). According to Respondent, the Commission's ability to pursue prospective relief against the State and State officials of the sort authorized by *Ex parte Young*, combined with the fact that no damages have yet been awarded, obviates the need for interlocutory

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[8] Because the Court held in *Hess* that the compact entity was not a sovereign and thus had no Eleventh Amendment protection, 513 U.S. at 41-42, there was no occasion to address the waiver issue presented here.

review of a denial of sovereign immunity from claims for retrospective relief.[9] This argument cannot survive scrutiny.

State officials are subject to prospective federal suits under *Ex parte Young* pursuant to a well-recognized **exception** to the Eleventh Amendment, not as a result of a waiver (or even partial waiver) of sovereign immunity. *Alden*, 527 U.S. at 747. Thus, Nebraska's consent to a Commission action brought for the purpose of requiring it "to perform" its Compact obligations, Art. IV(m)(8), or "to process" license applications in a timely fashion, Art. V(g), suggests no waiver of sovereign immunity whatsoever. The Eleventh Amendment is not even implicated with respect to claims seeking such *Ex parte Young* relief. If, as Respondent suggests and the Eighth Circuit so held, *see* footnote 1, *supra*, a State's recognition of the availability of prospective *Ex parte Young* relief constitutes a waiver of its immunity from all other forms of relief, the exception would swallow up the rule, and the Eleventh Amendment would be rendered meaningless.

Similarly, if surviving *Ex parte Young* claims could defeat interlocutory review of sovereign immunity denials as to other retrospective federal claims asserted simultaneously

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[9] Although immaterial to the question presented in the certiorari petition, which focuses solely on the claims seeking damages and other retrospective relief, Respondent's insistence that it also has sought prospective relief authorized by *Ex parte Young* is belied by the pleadings. Its prayer for an accounting of money heretofore spent by the State during the licensing process – supposedly improperly – is clearly retrospective, not prospective as Respondent has alleged. (Opp. at 11). Nor does Respondent's afterthought (asserted for the first time in its Supreme Court Opposition Brief), that Nebraska could have some unspecified "participation" in a restructured *federal* license review process (Opp. at 8), alter the retrospective nature of the prayer in the Complaint to remove the State as the principal license reviewer and transfer that responsibility to some federally-appointed authority. (*See* Pet. at 16 n.12). All other requested relief (*see* Opp. at 7-8) is unequivocally *retrospective*.

against the State and State officials, the Eleventh Amendment bar *from suit* – not merely *from liability* – on such claims would lose all force. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). It is an empty constitutional promise indeed if recognition of immunity must await a full trial and entry of a final judgment. *Id.* at 146 & n.5.

This Court, in *Behrens v. Pelletier*, 516 U.S. 299 (1996), thus expressly repudiated Respondent's contention that a State's ongoing exposure to *Ex parte Young* relief precludes interlocutory review of a district court's denial of immunity from suit on claims seeking non-prospective remedies. In addition to affirming the general right of the *Behrens* litigants to pursue multiple interlocutory appeals from immunity denial rulings, the Supreme Court flatly rejected the contention that immediate review is unavailable where, even if the trial court's immunity ruling is reversed, "the defendant will be required to endure discovery and trial on matters separate from the claims against which immunity was asserted." *Id.* at 311. The "right to immunity is a right to immunity *from certain claims*, not from litigation in general," the Court held. *Id.* at 312. "[W]hen immunity with respect to those claims has been finally denied, appeal must be available, and cannot be foreclosed by the mere addition of other claims to the suit." *Id.* Underscoring why a contrary holding would have an "intolerable" effect, the Court observed:

> If the district court rules erroneously, the qualified-immunity right not to be subject to pretrial proceedings will be eliminated, so long as the plaintiff has alleged (with or without evidence to back it up) violation of one "clearly established" right; and both that and the further right not to be subjected to trial itself will be eliminated, so long as the complaint seeks injunctive relief . . . .

Id.

Because the same rationale for affording immediate interlocutory review from denials of qualified immunity applies to denials of Eleventh Amendment sovereign immunity, *see Puerto Rico Aqueduct*, 506 U.S. at 144, the logic of *Behrens* applies with equal force here. To conclude otherwise, thereby rendering appellate review of immunity denials unavailable based on the absence of a final judgment on all claims, exposes States to highly invasive discovery and the burdens of trial on matters over which they may well have a constitutional right to be entirely free from suit. Indeed, simply by accompanying damage claims with prayers for injunctive relief under *Ex parte Young*, litigants could deprive States of a core constitutional protection, and reduce the Eleventh Amendment to a mere shibboleth, devoid of all substantive meaning or force. This Court has heretofore ruled that it will countenance no such result, *see Puerto Rico Aqueduct*, 506 U.S. at 144, and there is no reason to depart from that policy here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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